STATE OF MICHIGAN

COURT OF APPEALS

MOHAMMED ELKOUR and ZMC-3, INC.,

Plaintiffs/Counter-Defendants/
Appellees,

v

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant/Counter-Plaintiff/
Appellant.

UNPUBLISHED
May 27, 1997

No. 187542
Wayne Circuit Court
LC No. 93-333917

Before: Jansen, P.J., and Saad and M. D. Schwartz,* JJ.

SAAD, J.

I respectfully dissent.

I

Defendant/counter-plaintiff Nationwide Mutual Insurance Company appeals as of right from a jury verdict awarding plaintiffs $90,000, and finding no cause of action as to defendant's counter complaint in this insurance contract dispute. I would affirm the jury award.

Plaintiffs filed a breach of contract claim when defendant denied plaintiffs' claim for insurance proceeds to cover merchandise allegedly stolen from their business. After an investigation, defendant filed a counter claim for breach of contract and fraud against plaintiffs for allegedly filing a fraudulent insurance claim.[1]

II

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* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant argues and the majority agrees that the trial failed to instruct the jury regarding plaintiffs' burden of proof and impermissibly increased defendant's burden of proof. A detailed review of the instructions presented to the jury reveals no error when they are read as a whole, in the context of reciprocal claims for breach of contract and defendant's claim of fraud. Even if the instructions were as problematic as defendant claims, defense counsel failed to object to the instructions, or to any *omission* therefrom, in the circuit court. Where, as here, a party fails to object to jury instructions, appellate review is precluded absent manifest injustice. *Phillips v Deihm*, 213 Mich App 389, 403; 541 NW2d 566 (1995). On the facts of this case, there is no manifest injustice. Indeed, at oral argument, defendant's counsel conceded that defendant's trial counsel drafted the very instructions defendant now complains of.

III

Defendant also contends that the following comment made by plaintiffs' counsel in closing argument was so prejudicial that it denied defendant a fair trial:

> MR. ZAYID (Plaintiffs' Counsel): Ladies and gentlemen, finally, I submit to you this. That we should not act in haste to prejudge as the insurance company did. They had their mind set that Mr. Elkour did this, and they were not directed or interested in looking at any other persons that may have done this. We almost fell into the trap again last week in the United States over here in the bombing of Oklahoma.
>
> Ms. SHOOP (Defendant's Counsel): Your Honor –
>
> THE COURT: Mr. Zayid.
>
> MR. ZAYID: Your Honor, I'm using it as an example.
>
> THE COURT: That is an inflammatory example. Do not use it.
>
> MR. ZAYID: Your Honor – ladies and gentlemen, please don't use the haste of the insurance company to be served as a basis in this case. And I ask you to return a verdict for $119,000. Thank you.

While I agree with the majority that the comment was certainly improper, in light of defense counsel's immediate objection, and the trial court's admonition, defendant was clearly not denied a fair trial. Indeed, one must ask whether plaintiff would have been entitled to a new trial (had plaintiff lost) if defendant had made such a reference. For plaintiff's counsel to raise the subject as he did calls into question his trial strategy, but hardly warrants a new trial.

I agree with the balance of the majority's analysis, but obviously disagree with the conclusion and, therefore, I dissent.

/s/ Henry William Saad

[1] In an earlier action, Mr. Elkour was found not guilty of insurance fraud.